

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

TINA NGUYEN CRUZ,

Case No.: 2:19-cv-00952-APG-BNW

## Plaintiff

**Order (1) Granting in Part Motion to Dismiss, (2) Denying Request for Judicial Notice, and (3) Granting Leave to Amend**

KATE SPADE & COMPANY, LLC,<sup>1</sup>

[ECF Nos. 11, 13]

## Defendant

8 Plaintiff Tina Nguyen Cruz brings a putative class action against Kate Spade &  
9 Company, LLC for displaying purported illusory reference prices to induce consumers to  
10 purchase merchandise at outlet stores. Cruz purchased two items at a Kate Spade outlet after  
11 seeing signs in the store indicating the items were significantly discounted from the prices listed  
12 on the tags. Cruz alleges that she did not get the deal she thought she was getting because items  
13 at Kate Spade outlet stores are never actually sold at the reference price marked on the tags.  
14 Cruz argues that price tags displaying these false reference prices, and the accompanying signs  
15 that convey mark-downs from those reference prices, are false, misleading, and deceptive.

16 Based on these allegations, she contends that Kate Spade violated Nevada's consumer  
17 fraud laws, made negligent misrepresentations, and was unjustly enriched. Kate Spade moves to  
18 dismiss, arguing that Cruz failed to meet the pleading requirements and did not allege harm that  
19 entitles her to relief. Cruz responds that her complaint is sufficiently pleaded in light of Kate

<sup>22</sup> The defendant indicates, in numerous filings and in the Stipulated Discovery Plan and Scheduling Order, that Kate Spade & Company, LCC no longer exists and that Tapestry, Inc. is its successor. ECF No.43 at 1 n.1. Because I am giving leave to amend, Cruz may correct the defendant's name in the amended complaint.

1 Spade's exclusive control over its historical pricing data and that she alleged harm by pleading  
2 that she would not have bought the items but for the purported discounts.

3 I deny Kade Spade's request to take judicial notice of documents filed in support of the  
4 motion to dismiss. I grant its motion to dismiss because the complaint fails to meet the  
5 heightened pleading standard required for claims sounding in fraud and it alleges an unjust  
6 enrichment claim that is barred because Cruz has an adequate remedy at law. I deny the motion  
7 to dismiss in all other aspects. I grant Cruz leave to amend her complaint to cure the  
8 deficiencies.

9 **I. BACKGROUND**

10 While visiting a Kate Spade outlet store in Las Vegas, Nevada, Cruz found a wallet and  
11 purse that she was interested in purchasing. ECF No. 1 at 5. The price tag for each item  
12 contained one price, listed as "Our Price." *Id.* at 5. Signs next to the merchandise indicated the  
13 items were discounted by a significant percentage off the listed prices. *Id.* Believing she was  
14 getting a bargain and that the bargain could end soon, Cruz decided to purchase the merchandise.  
15 *Id.* However, Cruz alleges that she later learned the items at the outlet store are never sold at the  
16 "Our Price" amount indicated on the tags and are sold only at the lower "discounted" prices. *Id.*  
17 at 8. She further alleges that items sold at Kate Spade outlets are sold only at the outlets rather  
18 than through other Kate Spade merchandise channels. *Id.* Cruz states that she would not have  
19 purchased the items, or would have paid significantly less for them, had she known their true  
20 market value. *Id.* at 10.

21 Cruz brought this putative class action asserting several claims against Kate Spade. She  
22 alleges that Kate Spade's reference pricing practices constitute consumer fraud under Nevada  
23 Revised Statutes (NRS) § 41.600(1) as a deceptive trade practice under NRS § 598.0915(13) and

1 as false, deceptive, and misleading advertising under NRS § 207.171. She also alleges the  
2 reference pricing constitutes negligent misrepresentation and that it unjustly enriched Kate  
3 Spade.

4 **II. ANALYSIS**

5 Federal Rule of Civil Procedure 8(a)(2) requires a plaintiff to plead a “short and plain  
6 statement of the claim showing that the pleader is entitled to relief.” For a motion to dismiss, I  
7 must apply a two-step process in evaluating whether a party has stated a claim. *Bell Atl. Corp. v.*  
8 *Twombly*, 550 U.S. 544, 555-56 (2007). First, I must accept as true all of the complaint’s well-  
9 pleaded factual allegations and draw all reasonable inferences in favor of the plaintiff. *Ashcroft v.*  
10 *Iqbal*, 556 U.S. 662, 678 (2009). Legal conclusions and “mere conclusory statements” are not  
11 entitled to that same assumption of truth. *Id.* at 678-79. Second, I must determine whether the  
12 complaint’s factual allegations put forward a plausible claim for relief. *Id.* at 679. The well-  
13 pleaded facts must show that the claims are plausible, not merely conceivable. *Id.* at 683. This is  
14 a context-specific determination that requires drawing on my judicial experience and common  
15 sense. *Id.* at 679.

16 **A. Documents Filed in Support of the Motion**

17 Kate Spade asks me to consider a sample price tag and a sign that show that Cruz’s  
18 allegations are not plausible. At the motion to dismiss stage I typically cannot consider exhibits  
19 outside of a complaint without converting the motion into one for summary judgment. Kate  
20 Spade relies on the “incorporation by reference” doctrine, which allows me to treat certain  
21 documents as if they were originally attached to the complaint. *Khoja v. Orexigen Therapeutics,*  
22 *Inc.*, 899 F.3d 988, 1002 (9th Cir. 2018). The doctrine applies when a plaintiff’s complaint  
23 discusses the contents of a document without attaching it. *Hicks v. PGA Tour, Inc.*, 897 F.3d

1 1109, 1117 (9th Cir. 2018). A defendant can offer the document for consideration at dismissal,  
 2 so long as no party can fairly question its authenticity. *Id.*

3       The doctrine does not apply here because Cruz does not mention the sign in her  
 4 complaint nor rely on its contents.<sup>2</sup> Additionally, the price tag Kate Spade offers is not for  
 5 either of the items Cruz alleges she purchased. *See ECF No. 12 at 5.* And Cruz questions the  
 6 authenticity of the price tag and sign. *ECF No. 14 at 13.* Thus, I will not consider these exhibits  
 7 at this stage.

8           **B. Sufficiency of Pleaded Facts Under Rule 9(b)**

9       In addition to Rule 8's pleading requirements, Cruz's claims must also meet Federal Rule  
 10 of Civil Procedure 9(b)'s heightened pleading standard because all of her claims sound in fraud.<sup>3</sup>  
 11 Thus, she must "state with particularity the circumstances constituting fraud." Fed. R. Civ. P.  
 12 9(b); *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003). The heightened  
 13 pleading standard provides defendants with notice, deters plaintiffs from filing complaints "as a  
 14 pretext for the discovery of unknown wrongs," protects defendants from unwarranted  
 15 reputational harm, and blocks plaintiffs from imposing the costs of litigation "absent some

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 17       <sup>2</sup> Kate Spade relies on the Ninth Circuit case *Knievel v. ESPN* for the notion that a document  
 18 need not be referenced in the complaint for the doctrine to apply. 393 F.3d 1068, 1076 (9th Cir.  
 19 2005). However, this case is distinct from *Knievel* because there is no evidence that Cruz read  
 20 the proffered sign while shopping in the outlet store and she disputes the authenticity of the sign  
 21 and price tag. *See id.* at 1076-77.

22       <sup>3</sup> Cruz does not dispute this. ECF No. 14 at 10. Her consumer fraud statutory claims and her  
 23 common law negligent misrepresentation claim require elements that sound in fraud. NRS  
 24 § 598.0915(13) (containing the element "false or misleading"); § 207.171 (concerning the  
 25 display of "false, deceptive, or misleading" statements); *Guilfoyle v. Olde Monmouth Stock  
 Transfer Co.*, 335 P.3d 190, 197 (Nev. 2014) (stating that one element of a negligent  
 26 misrepresentation claim is that the defendant "suppl[ied] false information" (quotation omitted)).  
 27 And while an unjust enrichment claim does not require proof of fraud, Cruz supports this claim  
 28 of with allegations of "misleading, inaccurate and deceptive advertising." ECF No. 1 at 19.

1 factual basis.” *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009) (internal  
2 quotations omitted).

3 To meet the heightened pleading standard, a plaintiff must provide the “who, what, when,  
4 where, and how” of the fraudulent misconduct. *Vess*, 317 F.3d at 1106 (internal quotations  
5 omitted). This requires “more than the neutral facts necessary to identify the transaction. The  
6 plaintiff must set forth what is false or misleading about a statement, and why it is false.” *Id.*  
7 (emphasis omitted). The standard can be relaxed when the facts of fraud are in the defendant’s  
8 exclusive control. *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993). This does not  
9 “nullify” Rule 9(b) as the plaintiff must still state the “factual basis for the belief.” *Id.*; see  
10 *Concha v. London*, 62 F.3d 1493, 1503 (9th Cir. 1995) (requiring plaintiffs to plead facts  
11 surrounding the fraud for “which they can reasonably be expected to have access”).

12 Kate Spade contends that Cruz has failed to meet both Rule 9’s heightened pleading  
13 standard and Rule 8. It argues Cruz’s complaint turns on her assertions that the items are never  
14 sold at the reference prices and that its outlets sell only made-for-outlet products. Kate Spade  
15 contends Cruz did not offer any factual bases for these allegations. It also points out that Cruz  
16 did not conduct a pre-suit investigation, which some district courts in similar reference pricing  
17 cases have required. Cruz responds that the evidence necessary to allege the falsity of the  
18 reference prices, such as Kate Spade’s historical pricing information, is in Kate Spade’s  
19 exclusive control so her complaint needs to satisfy only the more relaxed Rule 9(b) standard.

20 Courts are divided on whether, and to what extent, a pre-suit investigation should be  
21 required for reference pricing cases.<sup>4</sup> While consumers need not conduct a rigorous investigative  
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23 <sup>4</sup> The Ninth Circuit has come out on both sides in unpublished cases. *Compare Sperling v. DSWC, Inc.*, 699 F. App’x 654, 655 (9th Cir. 2017) (affirming dismissal in a complaint that lacked a specifically alleged investigation), with *Rubenstein v. Neiman Marcus Grp. LLC*, 687 F.

1 to survive a motion to dismiss, some factual support is necessary for the complaint's allegations  
 2 to be facially plausible. *See Iqbal*, 556 U.S. at 683; *see also* Fed. R. Civ. P. 11(b)(3) (requiring  
 3 attorneys to certify that factual contentions in pleadings have evidentiary support or will likely  
 4 have evidentiary support after discovery). Cruz's complaint does not allege a plausible factual  
 5 basis for her allegations that Kate Spade's conduct involved false information. Because falsity is  
 6 a necessary element or critical part of all Cruz's claims, I dismiss the complaint.

7 First, Cruz cannot resort to the more relaxed Rule 9(b) standard because not all  
 8 information and sources related to Kate Spade's reference pricing is held exclusively by Kate  
 9 Spade. There are ways to obtain information on the reference prices before filing suit. In other  
 10 reference pricing cases, plaintiffs were able to support their complaints with descriptions of how  
 11 they tracked price changes for certain products over a period of time and compared online prices  
 12 or products. *See Fisher v. Eddie Bauer LLC (Fisher II)*, No. 19CV857 JM (WVG), 2020 WL  
 13 4218228, at \*3 (S.D. Cal. Feb. 3, 2020); *Jacobo v. Ross Stores, Inc. (Jacobo II)*, No. CV-15-  
 14 04701-MWF-AGR, 2016 WL 3483206, at \*3 (C.D. Cal. June 17, 2016). For example, plaintiffs  
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16 App'x 564, 568 (9th Cir. 2017) (holding that fictitious pricing allegations based on information  
 17 and belief are alone sufficient). Several district courts have required plaintiffs to allege that they  
 18 conducted a pre-suit investigation and to explain their findings to survive a motion to dismiss.  
*See, e.g., Fisher v. Eddie Bauer (Fisher I)*, LCC, 19-CV-857-JM, 2019 WL 9467922, at \*5 (S.D.  
 19 Cal. Oct. 18, 2019) (requiring a pre-complaint investigation of "sufficient depth" and finding that  
 tracking the price of two products in only one outlet store over 90 days was not enough); *Jacobo*  
*v. Ross Stores, Inc. (Jacobo I)*, No. CV-15-04701-MWF-AGR, 2016 WL 3482041, at \*3 (C.D.  
 20 Cal. Feb. 23, 2016) ("Plaintiffs must conduct a reasonable investigation into their claims and  
 plead at least some facts to bolster their 'belief' that the 'Compare At' prices were inaccurate.").  
 Other district courts have held it sufficient to allege items were never sold at the original price or  
 21 to allege that the plaintiff investigated without saying more. *Nemykina v. Old Navy, LLC*, --- F.  
 Supp. 3d ----, 2020 WL 2512884, at \*1, \*4 (W.D. Wash. May, 15, 2020) (finding that a general  
 22 reference to "subsequent investigation of [the plaintiff's] counsel" was sufficient); *Stathakos v.*  
*Columbia Sportswear Co.*, Case No. 15cv4543 YGR, 2016 WL 1730001, at \*4 (N.D. Cal. May  
 23 2, 2016) ("[P]laintiffs are not required to plead that they had conducted a pre-suit  
 investigation . . . in every case, particularly where the information is not within the personal  
 knowledge of the pleader.").

1 in a reference price case brought against Kate Spade in California supported their complaint with  
 2 internet comparative and archival research, corporate documents, interviews with former and  
 3 current employees, and references to unique product codes. *Pickles v. Kate Spade & Co.*, No. 15-  
 4 CV-05329-VC, 2016 WL 3999531, at \*1 (N.D. Cal. July 26, 2016).

5 Second, even if the historical reference pricing was in Kate Spade's exclusive control,  
 6 Cruz has failed to provide any factual basis for her statements made on information and belief,  
 7 which she must do even under the relaxed pleading standard. *Neubronner*, 6 F.3d at 672. Cruz's  
 8 complaint alleges no facts to support her belief. Any person could go to any outlet store,  
 9 purchase any item, and then write this same complaint. Determining that this complaint states a  
 10 claim, without providing more, would be contrary to Rule 9(b)'s purpose of preventing the court  
 11 system from being used to discover unknown wrongs. *Kearns*, 567 F.3d at 1125.

12 Cruz has failed to meet the Rule 9(b) pleading standard for her allegations regarding the  
 13 falsity of Kate Spade reference prices. I therefore dismiss the complaint.

14 Under Rule 15, leave to amend "shall be freely given when justice so requires." In  
 15 general, dismissal of a complaint without leave to amend is proper only if amendment would be  
 16 futile. *Albrecht v. Lund*, 845 F.2d 193, 195 (9th Cir. 1988). Cruz has filed a declaration from her  
 17 attorney that includes some additional (albeit vague) facts and a reference to an "investigation."  
 18 ECF No. 14-1 at 3-4. While I cannot consider those documents to resolve the motion to dismiss,  
 19 this additional information makes it at least possible that Cruz can remedy the complaint's  
 20 deficiencies to meet Rule 9(b) pleading standards. I grant Cruz leave to amend.

21 **C. Permissibility of Unjust Enrichment Claim When Statutory Relief is Available**

22 Kate Spade contends that Cruz's unjust enrichment claim should be barred because she  
 23 has adequate legal remedies through the Nevada consumer laws. Cruz responds that NRS

1 § 41.600(3) permits her to pursue both damages and equitable relief, and that Rule 8(d) allows  
 2 for alternative pleading. Because I am granting Cruz leave to amend, I address these arguments  
 3 to determine whether amendment to the unjust enrichment claim would be futile.

4 Under Nevada law, equitable claims are not available where the plaintiff has a full and  
 5 adequate remedy at law. *Small v. Univ. Med. Ctr. of S. Nev.*, No. 2:13-cv-00298-APG-PAL, 2016  
 6 WL 4157309, at \*3 (D. Nev. Aug. 3, 2016) (citing *State v. Second Judicial Dist. Ct. in & for*  
 7 *Washoe Cnty.*, 241 P. 317, 322 (Nev. 1925)). As the unjust enrichment claim is currently  
 8 pleaded, there is not any meaningful distinction between it and the claims brought under the  
 9 Nevada consumer law statutes. NRS §§ 41.600(3)(a)-(b) allows for damages and “any equitable  
 10 relief the court deems appropriate.” Cruz has not identified why the statutory provisions do not  
 11 provide her with an adequate remedy. Cruz bases her unjust enrichment claim only on the  
 12 allegation that the reference prices are “misleading, inaccurate, and deceptive advertising.” ECF  
 13 No. 1 at 19. The consumer statutes cover false, misleading, and deceptive statements regarding  
 14 the price of goods. NRS §§ 598.0915(13); 207.171. At least as currently pleaded, the statutory  
 15 provisions provide Cruz with a full and adequate remedy at law, so her unjust enrichment claim  
 16 is not permissible. But because it is not clear that amendment would be futile, Cruz may amend  
 17 her complaint to plead additional facts that would allow her to recover under an unjust  
 18 enrichment theory in a way that the statutes would not allow, if such facts exist.

19 **D. Sufficiency of Prayers for Relief**

20 Kate Spade argues that Cruz cannot sustain her prayers for relief because she has not  
 21 suffered harm that would entitle her to any amount of damages or restitution.<sup>5</sup> Kate Spade  
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23 <sup>5</sup> Kate Spade also argues that the Nevada consumer statute bars Cruz from pursuing equitable  
 relief. But NRS §§ 41.600(3)(a)-(c) allows plaintiffs bringing private rights of action to seek  
 “equitable relief that the court deems appropriate,” in addition to damages and attorney’s fees.

1 contends that the test for relief should be the difference between what Cruz paid and the value  
 2 she received. Because Cruz paid the discounted price and received something valued at the price  
 3 she paid, Kate Spade argues Cruz suffered no harm. Kate Spade asserts that to maintain her  
 4 prayers for relief, Cruz should be required to allege that she received items that were worth less  
 5 than what she paid for them or to allege the items were damaged or defective. Cruz argues that  
 6 she suffered harm by purchasing items she would not have otherwise purchased or that she  
 7 would have purchased only at a lower cost. She contends that Kate Spade received a price  
 8 premium benefit and additional sales because of the alleged unlawful conduct.

9 There are several ways to measure restitution. *See Restatement (Third) of Restitution and*  
 10 *Unjust Enrichment III 7 1 Intro. Note (2011)*. For example, restitution can be calculated by a  
 11 conscious wrongdoer's profits, even if it may exceed any loss to the claimant. *Id.* § 51. Because  
 12 Cruz has alleged she would not have purchased the items but for the reference pricing, she has  
 13 sufficiently alleged harm that could be determined under some measure of restitution. It is thus  
 14 premature to conclude at this stage that she cannot state any form of restitutionary relief. *See*  
 15 *Stathakos v. Columbia Sportswear Co.*, No. 15-CV-04543-YGR, 2016 WL 1730001, at \*4 (N.D.  
 16 Cal. May 2, 2016) ("The question of whether or not plaintiffs can later prove the amount of  
 17 monetary restitution is a question better addressed at a later stage.").

18 Cruz has not alleged her items are worth less than what she paid for them,<sup>6</sup> but that is not  
 19 required to survive a motion to dismiss. The Nevada consumer fraud statute allows a cause of  
 20 action for anyone who is a "victim" of consumer fraud. NRS § 41.600(1); *see Fairway Chevrolet*  
 21 *Co. v. Kelley*, No. 72444, 429 P.3d 663, 2018 WL 5906906, at \*1 (Nev. 2018) (construing  
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23<sup>6</sup> In both the Opposition and in an attached declaration, Cruz includes other facts that suggest  
 Kate Spade outlet products are different in quality. *See* ECF Nos. 14 at 13; 14-1, at 3-5. If Cruz  
 intends to rely on those facts, she must plausibly allege them in her amended complaint.

1 “victim” as “conno[ting] some sort of harm being inflicted”). The Ninth Circuit has also  
2 acknowledged that false reference prices can amount to economic injury when the consumer  
3 alleges that (1) she relied on a misrepresentation and (2) she would not have bought the product  
4 but for the misrepresentation. *Hinojos v. Kohl’s Corp.*, 718 F.3d 1098, 1104 (9th Cir. 2013)  
5 (interpreting California consumer statutes and case law). Cruz alleges she spent her money on  
6 purchases that she otherwise would not have. Consequently, an amended complaint that sets  
7 forth these prayers for relief would not be futile.<sup>7</sup>

### **III. CONCLUSION**

I THEREFORE ORDER that defendant Kate Spade's motion to dismiss (**ECF No. 11**) is **GRANTED IN PART**. I dismiss all of plaintiff Tina Cruz's causes of action.

I FURTHER ORDER that plaintiff Tina Cruz may file an amended complaint by October 21, 2020. If she fails to file an amended complaint by that date, this case will be closed.

13 DATED this 30th day of September, 2020.

ANDREW P. GORDON  
UNITED STATES DISTRICT JUDGE

<sup>7</sup> Kate Spade also moves to dismiss the prayers for relief related to the proposed class. ECF No. 11 at 23 n.10. As this is a proposed class action, there is no basis to strike the prayers for class relief at this stage.